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No. 17358.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MAURIE W. STARRELS and DORIS W. STARRELS,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petition to Review a Decision of the Tax Court of the
United States.

PETITIONERS' OPENING BRIEF.

Statement of Facts.

A stipulation of facts executed by the parties [Tr. 11-13] recited that the petitioner Doris W. Starrels was the daughter of the late Commander Frank W. Wead, U.S.N. [pars. 1, 2]; that Loew's, Inc., desired to produce a motion picture concerning naval aviation, and ultimately did produce and market such a picture [par. 3]; that Loew's, Inc., intended the photoplay to be "based on, adapted from, or using as a springboard the life story" of Commander Wead [par. 4]; that

Loew's, Inc., entered into an agreement with the petitioner on November 9, 1954, contained in two documents, styled an "option" and a "consent". Attached thereto as Exhibits were the option agreement 3-C and the consent 4-D [par. 6]; that in 1956, Loew's, Inc., produced and distributed throughout the United States a feature motion picture in which was depicted events taken from the life of Commander Wead [par. 7]; and that pursuant to the contract of November 9, 1954, Loew's, Inc., paid \$5,800.00 to the petitioner in 1956 [par. 8].

On January 26, 1961, the Tax Court filed its opinion [Tr. 14-19] deciding that there was a deficiency in income tax for the year 1956 in the amount of \$1,-530.87 resulting from the \$5,800 payment by Loew's, Inc. to petitioner.

Specifications of Error.

The Tax Court erred as follows:

1. In holding that the money received from Loew's was taxable income on the stated ground of absence of evidence that the motion picture, in fact, injured or damaged the payee by an invasion of her right of privacy or in any other way [Assignment of Error No. 1, Tr. 22].

2. In failing to rule upon petitioners' contention that, unlike libel and slander, the gist of the action in privacy cases is not injury to the character or reputation, and that an invasion of privacy occurs without re-

gard to any effect which the publication may have on the standing of the individual in the community [Assignment of Error No. 2, Tr. 22-23].

Question Presented.

The taxpayer has received from the producer of a motion picture depicting events in the life of her deceased father a sum of money as consideration for her agreement not to claim any violation of her personal right of privacy by reason of the production and exhibition of the film. The film has been produced and widely exhibited. Is this money properly includible in her gross income under 26 U. S. C. 104(a)(2) which excludes "the amount of any damages received (whether by suit or agreement) on account of personal injuries"?

ARGUMENT.

I.

The Tax Court Erred in Holding That There Was No Showing of an Injury to Taxpayer's Personal Right of Privacy.

Although the decision below recognized that in 1956, Loew's, Inc. had produced and distributed through the United States a motion picture which depicted events taken from the life of the taxpayer's father [Tr. 16], the Tax Court held that taxpayer's personal right of privacy "was never invaded and possibly never intended to be invaded" [Tr. 18] and that no valid claim for exclusion may be made "without some showing of an injury which has been sustained" [Tr. 19].

Petitioners respectfully submit that the production and distribution of such a motion picture constituted *per se* an injury to taxpayer's privacy. The Tax Court erred, it is submitted, when it equated an invasion of privacy with an injury by defamation.

The Supreme Court of California has ruled contrary to the Tax Court. In *Curtis v. Gill* (1952), 38 Cal. 2d 273, 239 Pac. 630, it said at p. 281:

"Plaintiffs do not allege that their right of privacy was invaded or that they suffered mental distress, assert defendants, and thus no cause of action is stated. Plainly the complaint alleges facts which clearly show a violation of plaintiffs' right of privacy. More is not necessary."

The California court cited the Restatement of Torts as follows (p. 280):

"867. A person who unreasonably and seriously interferes with another's interest in not having his

affairs known to others or his likeness exhibited to the public is liable to the other.”

“The right of privacy concerns one’s own peace of mind, while the right of freedom from defamation concerns primarily one’s reputation.” 41 Am. Jur. 925 (Fn. 15), 138 A.L.R. 25. “Unlike libel and slander, the gist of the cause in privacy cases is not injury to the character or reputation, but direct wrongs of a personal character resulting in injury to the feelings, without regard to any effect which the publication may have on the standing of the individual in the community.” 41 Am. Jur. p. 925 (Fn. 15.5 Cum. Supp.).

Petitioners submit that public exhibition for commercial purposes of one’s family life is *ipso facto* an invasion of the personal right of privacy, no matter how well-intentioned, and that the parties may contract for reparation of such a planned invasion of property by fixing in advance a sum which liquidates such damage and fixes a ceiling for its recovery.

II.

The Four Decisions Relied Upon by the Tax Court [Tr. 17] Are Not Applicable to the Instant Case.

Damon Runyon, Jr. v. U. S. (C. A. 5, 1960), 281 F. 2d 590, as the Tax Court pointed out [Tr. 17, fn. 1], involved the rights of the deceased father, not the taxpayer himself. In California, as in New York, one cannot recover as an heir, the right being limited to a person (like the petitioner here) whose own privacy was invaded (*Metter v. L. A. Examiner* (1939), 35 Cal. App. 2d 304, 310, 95 P. 2d 491).

Helen D. Miller (1961), 35 T. C. No. 68, involved a claimed sale of a capital asset (the right to use the name, likeness and good will attached to the late Glenn Miller) to which the release of the widow's rights of privacy was merely incidental [Tr. 17, fn. 1].

In *Erlich v. Higgins*, (S.D. N.Y., 1943), 52 Fed. Supp. 805 and *Meyer v. U. S.* (E.D. Tenn., 1959), 173 Fed. Supp. 920, both District Courts bottomed their decisions on the fact nothing "libelous, slanderous or defamatory" was actually published and therefore no wrong had been done. Under petitioner's argument in Point I, *supra*, this factor is legally irrelevant on the question of whether there was an invasion of the right of privacy.

III.

Compensation for the Invasion of Personal Rights by Defamation, Alienation of Affections, Breach of Promise to Marry or Change of Child Custody Has Long Been Treated as Not Taxable.

As early as 1922, the Solicitor of Internal Revenue (Sol. Op. 132, Cum. Bull. I-1, p. 92.93 [1922]), declared that:

"In *Stratton's Independence v. Howbert*, 231 U. S. 399 and in *Eisner v. Macomber*, 252 U. S. 189, 207, the Supreme Court defined income as 'the gain derived from capital, from labor, or from both combined'. . . .

"In the light of these decisions of the Supreme Court it must be held that there is no gain, and therefore no income, derived from the receipt of damages for *alienation of affections or defamation*

of personal character. . . . If an individual is possessed of a personal right that is not assignable and not susceptible of any appraisal in relation to market value, and thereafter receives either damages or payment in compromise for an invasion of that right, it cannot be held that he thereby derives any gain or profit. It is clear, therefore, that the Government cannot tax him on any portion of the sum received.” (Emphasis supplied.)

C. A. Hawkins v. Commissioner (1927), 6 B. T. A. 1023 held that a \$100,000 settlement for personal *defamation* was not taxable.

Lyle McDonald v. Commissioner (1928), 9 B. T. A. 1340 held that money paid as settlement for a claim of *breach of promise to marry* was not includible in gross income.

This line of decision has been the subject of favorable scholarly comment:

“There is a class of compensatory recoveries no part of which is taxes as income, since no cost basis can be assigned to the injury which is sustained. Most important of these are recoveries on account of personal injuries. This is now expressly provided for by statute [now I.R.C. of 1954, 26 U. S. C. 104(a)(2)], but the same rule had previously been followed. In the same category, although not covered by the statutory exception, are recoveries for libel and slander, for alienation of affections, or for breach of promise to marry, and sums received in settlement of child custody suit. For the human body and the reputation which are injured are in no true sence capital or property upon which a value can be placed for

the purpose of computing the profit realized; the promise to marry likewise is a personal right not susceptible of appraisal in relation to market values; and the spouse whose affections are alienated and the child whose custody is surrendered are not chattels which are sold.”

Plumb “Income Taxes on Gains and Losses in Litigation” (1938), 25 Cornell L.D. 221, 234.

See also:

Cutler “Taxation of the Proceeds of Litigation” (1957), 57 Col. L. Rev. 470, 471 fn. 5.

Conclusion.

The decision of the Tax Court should be reversed.

Respectfully submitted,

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